IN THE

Supreme Court of the United States

October Term, 1961

No. 384

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
v.
SALLY L. BILDER, etc.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT, SALLY L. BILDER

MARTIN D. COHEN,
744 Broad Street,
Newark 2, New Jersey,
Attorney for Respondent.

LOUIS J. COHEN,
LAURENCE N. ROSENBAUM,
MEYER H. SCHER,
Of Counsel.

TABLE OF CONTENTS

Cases Cited

Statutes and Regulations Cited

Miscellaneous

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Question Presented

May the lodging expense of a winter's stay in Florida, *when incurred as a medical necessity and primary part of necessary medical treatment of a disease afflicting the taxpayer*, be deducted as "medical expense" under Section 213 of the Internal Revenue Code of 1954?*

* Italics have been used to indicate critical "terms and circumstances of the case", required by Supreme Court Rule 40 (1) (d)(1) but omitted from the Commissioner's statement of the Question Presented (*vide*, Commissioner's Br. 2).

Counter-Statement of the Case

The brief filed by the Commissioner in the Court below states (top of page 4) that "the facts as found by the Tax Court are not disputed by the Commissioner." Then follows a recital of such facts (pages 4-7, inclusive), admirable for both its fidelity and completeness. However, in the brief filed by the Commissioner herein, his statement of facts (Br. 4-5) has been shortened from four pages to less than two pages. In the process, the Commissioner omits most of the undisputed facts absent which no true understanding can be had of the taxpayer's illness, the urgency of the medical advice he received, the proximate causality of such advice to the taxpayer's illness, the extent of the considerable personal sacrifice which the taxpayer and his family had to make in obeying such advice, and, perhaps most importantly, the medical basis for his physician's conclusion that, although hospitalization during the winter months "might' have preserved the taxpayer's life, the treatment prescribed for him at Fort Lauderdale was bound to prove safer and more efficacious.

The taxpayer's principal contentions require that we restore to the Commissioner's skeletal statement of facts the more significant omissions.

The taxpayer was born March 14, 1911. He was a member of a Newark, New Jersey law firm. (R. 3). In April, 1953, at the age of 42, the taxpayer suffered his fourth heart attack, technically known as a "myocardial infarction." (R. 3, 33). That term means that muscular tissue of the heart has become necrotic due to a lack of sufficient blood circulation. In the taxpayer's case, as is true generally, upon the occurrence of each such event other blood vessels already in existence and newly developed vessels gradually took over the burden of providing the blood supply for that portion of his heart muscle which remained alive and still functioning after each attack. (R. 3).

Accepted as proper treatment by eminent heart specialists, at least in the United States, is the advice to such patients as the taxpayer that, if they live in a cold climate, they are to remain indoors or hospitalized during the winter months or, in the alternative, spend the winter months in a warm climate. The latter alternative advice had been given to the taxpayer by an eminent heart specialist because the taxpayer was a hyperkinetic person with an unusual inner stress and tension. To confine him either at home or in a hospital in the relatively cold climate of New Jersey throughout the winter months would have resulted in danger to his health from two sources. Such extended inactivity would have increased his inner stress and tension, which are medically accepted as tending to cause the recurrence of heart attacks in one who has previously suffered one or more such incidents. Mild exercise of the type not available while confined to home or hospital is required for such a person and was required for taxpayer in order that new vascular passages for blood to the heart may more readily and quickly develop. (R. 4).

Subsequent to such advice, the taxpayer, his wife, and child traveled from their home in New Jersey to Fort Lauderdale, Florida, in December of 1953. From January 1, 1954, to March 24, 1954, they lived there in a rented apartment paying a total rent for the period of $1,500. The taxpayer chose Fort Lauderdale and the apartment for the following reasons:

The specific disease from which the taxpayer suffered is atherosclerosis. The objective of the medical treatment accorded him was therefore the prevention of the clotting of his blood and the prescribing of Dicumerol, an anticoagulant drug. The objective of the advice given him as part of the treatment of his disease, concerning the conduct of his way of life, was that he should live under such condi-

tions that he could obtain the proper exercise so that he might develop sufficient coronary blood vessel capacity to properly nourish what remained of his heart muscle tissue. (R. 4.)

The primary objective of all of the taxpayer's treatment and the advice given incidental thereto was the prevention of any further myocardial infarction with resulting impairment or destruction of the functioning of his heart, thus prolonging his life. Fort Lauderdale climate accords with this advice. Dicumerol, in 1953, was not widely used in the treatment of heart disease and relatively few doctors were competent to use it for that purpose. Because the drug prevents the natural tendency of human blood to clot, its use is attended by grave danger of hemorrhage unless doctors and hospitals competent to control the dosage and measure the level of the drug in the blood of the patient are readily available. One of the few doctors in Florida then competent to supervise taxpayer's use of the drug was in Fort Lauderdale. The taxpayer's apartment was in close proximity to one of the few hospitals then able to test his blood to determine the correct dosage of Dicumerol. (R. 4-5).

The taxpayer resided in Fort Lauderdale during the winter months of the taxable years 1954 and 1955 and remained under the care of the same doctor during those months of each year. The doctor examined the taxpayer at least weekly and upon occasion oftener when required in order to maintain the proper percentage of Dicumerol in his blood. (R. 5).

At the end of each winter's stay at Fort Lauderdale, the taxpayer returned to Newark where he resumed his law practice.

While in Florida during 1954 and 1955 taxpayer taught school at a salary of $50 per week. During such periods.

by agreement with other members of his Newark law firm, although he continued to share in its profits, the taxpayer forfeited a $150 weekly drawing account therefrom. The moves to Florida, the attendant disruption of the taxpayer's household, and the necessity that their daughter be taken from one school and placed in another constituted a burden upon the family. Their sojourns in Fort Lauderdale during the years at issue were not vacations; they were taken as a medical necessity and as a primary part of necessary medical treatment of a disease from which the taxpayer was suffering. (R. 5-6).

The Tax Court found that the necessary expense of $500 and $277 for 1954 and 1955, respectively, for the *individual* housing of the taxpayer in Fort Lauderdale and his transportation expense for each of the years at issue were incurred or paid by him for the mitigation and treatment of myocardial infarction, for the prevention of further such heart damage as a result of atherosclerosis from which he suffered during those years, and for the purpose of maintaining the proper functions of his heart and constitute expenses incurred by the taxpayer for medical care and treatment. (R. 6).

The Commissioner filed a petition for review by the United States Court of Appeals for the Third Circuit urging therein that no part of the taxpayer's lodging expense should have been allowed as a deduction under Section 213 of the 1954 Code. (R. 12). The taxpayers filed a cross petition for review contending that the entire lodging expense should have been allowed, first, because the question of allocating such lodging expense as between the taxpayer and his family had never been in issue before the Tax Court; and second, because it was evident from the record below that it would have been medically unsafe for the taxpayer to travel without his wife or a nurse in view of his history of four successive heart attacks. (R. 12, 33).

The Court below ruled in the taxpayer's favor both on the petition and cross petition for review.

This Court has granted the Commissioner's petition for a writ of certiorari because of an apparent conflict between the holding of the Court of Appeals for the Third Circuit in this case and the holding of the Court of Appeals for the Second Circuit in *Carasso* v. *Commissioner*, 292 F. 2d 367, pending on petition for a writ of certiorari, No. 675 Misc., this Term. (Br. 8-9).

In a footnote appended to his brief, the Commissioner has expressly limited his appeal "to the question of deductibility *vel non* of the cost of lodging during a medically necessitated trip" and expressly "consent[s] to the affirmance of the judgment below should that question be resolved against the government" (Br. 21).

Summary of Argument

Section 23(x) of the Internal Revenue Code of 1939 defined as "medical care" (and allowed a deduction for) "amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body."

As interpreted by the courts and the Commissioner, the deductibility, under Section 23 (x), of amounts paid for food and lodging in connection with travel for medical reasons was dependent upon determination of whether *ordinary living expenses* or *extraordinary medical expenses* were involved. For this purpose, a critical examination of the facts and circumstances of each case was of prime importance. Travel expenses found to have been incurred for general health reasons were regarded as *ordinary* living expenses and held to be non-deductible. Only those expenses which, in all reasonable likelihood, *would not*

have been incurred at all but for the existence of an illness and the taxpayer's obedience to medical advice with respect thereto, were held to constitute *extraordinary* medical expense, deductible under Section 23(x).

Section 213(e)(1)(A) of the Internal Revenue Code of 1954 preserves the definition of "medical care" found in 1939 Code Section 23(x), and adds thereto (in the disjunctive), as subparagraph (B), [amounts paid] "for transportation primarily for and essential to medical care referred to in subparagraph (A)."

The Commissioner argues that his reading of Section 213, particularly in conjunction with Section 262 (disallowing personal, living, and family expenses absent express provision therefor), compels him—*notwithstanding proven medical necessity*—to disallow all food and lodging costs as deductions for medical care, unless incurred in a hospital or similar institution.

A fair, considerate and logical reading of Section 213, together with its legislative history, reveals that, despite some ambiguity in the latter, the distinction between nondeductible ordinary living expense and extraordinary (therefor deductible) medical expense has been preserved.

The Commissioner's interpretation of "medical care" is demonstrably illogical, inequitable and inconsistant. Moreover, its adoption would frustrate the overall purpose of Section 213 which the Commissioner himself recognizes was to "liberalize and extend relief in real hardship situations due to heavy medical expense while curbing the deduction of ordinary or luxury living expenses in the *guise of medical costs.*"

ARGUMENT

POINT I

The travel in connection with which lodging expense was incurred by the taxpayer was not merely "prescribed by the taxpayer's physician for purposes of his health" but was determined by such physician to be preferable to the only other alternatives for preserving the taxpayer's life.

Without denying that this case must ultimately turn upon legal principles, in particular, rules of statutory construction, we nevertheless respectfully reassert the axiom that principles of law can have no relevance to any case until the facts of that case are fully and accurately stated. Until now, this Court has never reviewed an income tax case involving the deductibility of expenses for medical care. However, those courts of intermediate appellate jurisdiction which have spoken on the subject agree with the Tax Court of the United States that each case of this character must be decided on its own particular facts. *Commissioner* v. *Stringham*, 183 F. 2d 579 (6th Cir. 1950); *Rodgers* v. *Commissioner*, 241 F. 2d 552, 555 (8th Cir. 1957); *Frances Hoffman*, 17 T.C. 1380, 1383, 1386 (1952); *L. Keever Stringham* 12 T.C. 580, 584-585 (1949), aff'd *Commissioner* v. *Stringham*, *supra*; *Vincent P. Ring* (1955) 23 T.C. 950, 953; cf. *Ochs* v. *Commissioner*, 195 F. 2d 692 (2d Cir. 1952), cert. denied, 344 U. S. 827.

The purpose of the factual inquiry in any case where expenses for such items as food and lodging are involved is to determine whether or not there is presented one of those admittedly "rare situations" where such expenses lose their identity as ordinary personal expenses and acquire deductibility as "extraordinary medical expenses."

that is to say, amounts expended primarily for the prevention or alleviation of disease. *L. Keever Stringham, supra,* 584-585; *John J. Thoene* 33 T.C. 62, 65 (final paragraph) (1959); *Vincent P. Ring, supra,* 953; *Frances Hoffman, supra,* 1385. As stated in *Rodgers* v. *Commissioner, supra,* 555:

> "Of course, each such situation must be appraised and made to turn on its individual facts and circumstances. *Commissioner of Internal Revenue* v. *Stringham,* 6 Cir., 183 F. 2d 579. Thus, the ultimate determination in a case of this character ordinarily rests to a substantial degree on a scrutinizing, resolving and balancing of the established and inferential facts."

It is the taxpayer's contention, as will be developed in subsequent portions of this brief, that although the distinctions between non-deductible ordinary living expenses and extraordinary (deductible) medical expenses were developed under the Internal Revenue Code of 1939, such distinctions have been preserved and are to be accorded identical tax treatment under the 1954 Code. We, therefore, earnestly entreat this Court not to emulate the Commissioner, whose overgeneralized statement of facts, is a poor gloss of the peculiar, if not unique facts of this case.

The facts found by the Tax Court and no longer disputed by the Commissioner establish that, in the case of *this taxpayer,* exposure to another New Jersey winter might well prove fatal in view of the atherosclerotic heart disease from which he suffered and his previous history of recurrent myocardial infarctions.[1] Two alternatives were presented: hospitalization or presence in an equable clime;

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[1] The taxpayer left for Florida in December, 1953 (R. 3, 4, 33). His fourth heart attack had occurred in April of the same year.

in either case, until winter ended and the taxpayer might, from a medical point of view, safely return to the pursuit of his livelihood as a practicing New Jersey attorney. Because of the taxpayer's "hyperkinetic make up", hospitalization presented serious medical disadvantages. Presence in an equable clime (and at one of the few locales[2] where certain specialized medical skills and facilities[3] were available) was medically preferable to hospitalization for several valid reasons. Not the least important reason was the taxpayer's need for moderate exercise in order to develop th collateral coronary vessels designed by nature to replace and supplement damaged coronary arteries. While in Fort Lauderdale, the taxpayer was under constant medical care. Add to the foregoing, the domestic disruptions and financial sacrifices which the taxpayer and his family had to accept in obeying the medical advice given to him, and every test is met in order to qualify the taxpayer's Florida lodging expense as an "extraordinary medical expense." (R. 3-5).

The importance of this factual premise to a correct determination of the legal issues raised in the case will repeatedly appear, in different contexts, hereafter.

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[2] Fort Lauderdale, Florida was one (R. 5).

[3] Necessary in conjunction with the then little understood anticoagulent therapy prescribed for the taxpayer and which together with his presence in an equable clime during the winter months constituted his regimen for survival (R. 5).

POINT II

Under the Internal Revenue Code of 1939, expenses for lodging away from home were regarded as "extraordinary medical expense", deductible under Section 23(x), only if such expenses were shown to have been incurred primarily for the prevention or mitigation of a particular physical or mental defect or illness.

As was intimated under Point I, a distinction was made under the 1939 Code by both the courts and the Commissioner between those expenses for food, lodging, and travel which remained essentially ordinary living expenses and those which, under the particular circumstances involved, truly constituted medical expense. The problem was well expressed by the Tax Court in *Frances Hoffman* (1952) 17 T.C. 1380, 1383:

> "It is provided in section 24(a)(1) that 'Personal living, or family expenses, except extraordinary medical expenses deductible under section 23(x)' shall not be deducted from gross income, and this provision clearly indicates that section 23(x) is to be read in conjunction with section 24(a)(1). Where, as in this proceeding, a taxpayer seeks deduction for the expenses of meals and lodging under the claim that such expenses constitute 'medical expenses' within the intendment of section 23(x), inquiry must be made whether the expense is truly 'medical expense' or is living expense. A line must be drawn between living expenses which are not deductible under section 24(a) and 'extraordinary medical expenses deductible under section 23(x)'."

A careful reading of *Frances Hoffman, supra*, as well as such other landmark cases as *L. Keever Stringham, supra*,

and *Edward A. Havey* 12 T.C. 409 (1949) (Reviewed by the Court), reveals that the essence of this all-important distinction is that "extraordinary medical expenses" are those *incurred primarily* for the prevention, treatment, cure, or mitigation of a specific physical or mental defect, illness, or disease, whereas, an expense *not primarily incurred* for any such purpose retains its character as an ordinary living expense. As stated in *Frances Hoffman, supra,* 1385:

> "The question must always involve the acceptance of one and the rejection of the other one of the above alternatives. A line must be drawn somewhere between that which is a personal expense and that which is incurred primarily for the prevention of illness and disease."

The specific tests to be applied in determining which expenses are *primarily* for medical care and which are not were carefully and thoughtfully set forth in *Edward A. Havey, supra,* 411-412.

In a ruling issued in 1955, the Commissioner undertook a codification of the case law which had developed under Section 23(x). Rev. Rul. 55-261 1955-1 CUM. BULL. 303. Citing a variety of factual situations, the Commissioner's ruling indicates which constitute deductible medical care under Section 23(x) and which do not. In an appendix to this brief, we have listed all those cases discoverable by our research wherein the courts have been called upon to distinguish, *on a factual basis*, between non-deductible ordinary living expenses and extraordinary medical expenses.[4] Such cases have been separated in our appendix

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[4] We have not included in our appendix cases involving expenditures for capital improvements such as air conditioners and elevators, since such cases raise problems not involved here. Nor have we included cases turning on questions of law alone.

in accordance with whether the claimed expenses were disallowed in full, partially disallowed or, allowed in full. Out of a total of 40 cases thus surveyed, deductions were fully disallowed in 26 cases, partially disallowed in 9 cases, and fully allowed in only 5 cases. The pure arithmetic of the matter establishes beyond any serious doubt that the Commissioner and the courts have been ultra-vigilant in their efforts to thwart any attempted abuse of the medical deduction provision of the Internal Revenue Code. We can only wonder, therefore, upon what basis the Commissioner is able to justify the following statement contained in his brief:

> "The broad interpretation of Section 23(x) opened the door to abuse. It introduced unfair discrimination into the treatment of ordinary everyday costs of living by allowing taxpayers suffering from disease to deduct family and living costs of a kind incurred by all taxpayers and not solely or even primarily the consequence of the need for medical care." (Br. 12).

We find far more persuasive and historically accurate the rebuttal given to a similar contention made by the Commissioner a decade ago in a case, which, incidentally, the Commissioner won. The late, distinguished Circuit Judge Jerome Frank had this to say in a dissenting opinion:

> "In the final analysis, the Commissioner, the Tax Court and my colleagues all seem to reject Mr. Ochs' plea because of the nightmarish spectacle of opening the floodgates to cases involving expense for cooks, governesses, baby-sitters, nourishing food, clothing, frigidaires, electric dish-washers—in short, allowances as medical expenses for everything 'helpful to a convalescent housewife or to one who is nervous or weak from past illness.' I, for one, trust the Commissioner to make short shrift of most such claims."

Ochs v. *Commissioner*, 195 F. 2nd 692, 696-697 (2nd Cir. 1952).

The distinction between ordinary living expenses and extraordinary medical expenses which has been part and parcel of the administration of 1939 Code Section 23(x) since its enactment in 1942 has been understood and assiduously preserved by the courts and the Commissioner. The existence of this dichotomy has served, on the one hand, to curb and discourage abuse, while, on the other, affording much needed relief from burdensome taxes to those whose heavy medical expenses include the costs of food, lodging and transportation in connection with medically imperative travel; costs which in all reasonable probability would not otherwise have been incurred.

POINT III

The complete legislative history of the deduction for medical expenses establishes that its enactment was a liberalization of the law in the taxpayer's favor, begotten from motives of public policy, and, therefore, to be broadly construed in the taxpayer's favor.

Prior to 1942, no deduction for medical expenses was contained in the Federal income tax law. However, such a deduction was provided for by Section 127 of the Revenue Act of 1942 which added subsection (x) to Section 23 of the 1939 Code. Subsequent amendments of Section 23(x) related solely to limitations on the maximum amounts deductible. As indicated by the Court below, such amendments have consistently reflected a Congressional attitude looking towards progressively increasing liberalization. (R. 22, footnote 11).

The need for a medical deduction was expressed in the report of the Senate Finance Committee (in whose draft of the 1942 Act the provision first appeared) as follows:

> "This allowance is recommended in consideration of the heavy tax burden that must be borne by individuals during the existing emergency and of the desirability of maintaining the present high level of public health and morale." S. Rept. No. 1631, 77th Cong. 2d Sess. 1942-2 CUM. BULL. 504, 508.

The Finance Committee's detailed explanation of the original Section 23(x) points out:

> "The term 'medical care' is *broadly* defined to include amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. It is not intended, however, that a deduction should be allowed for any expense that is not incurred primarily for the prevention or alleviation of a physical or mental defect or illness." S. Rept. No. 1631, *supra*, 576-577. (Italics added.)

It was clear from the outset, as evidenced by the report of the Committee of Conference, that Section 23(x) was added to Code "to allow a deduction for *extraordinary expenses* paid during the taxable year for medical care of the taxpayer, his spouse, or a dependent of the taxpayer." Amendment No. 75, H. Rept. No. 2586, 77th Cong. 2d Sess., 1942-2 CUM. BULL. 701, 705, (Italics supplied).

To carry out this Congressional intent, Section 127 of the Revenue Act of 1942 also amended 1939 Code Section 24-(a)(l) so as to provide:

Sec. 24. ITEMS NOT DEDUCTIBLE.

(a) GENERAL RULE.—In computing net income no dededuction shall in any case be allowed in respect of—
(1) Personal, living, or family expenses, *except extraordinary medical expenses deductible under section 23-(x);* [italicized material added to Code by Sec. 127(b) and Sec. 101, Rev. Act. 1942].

Adverting to the foregoing legislative history and noting that both the Courts and the Commissioner had carried out the intent that Section 23(x) be "broadly" construed, the Court below made these observations:

"The foregoing establishes that the entire legislative concept of 'medical care' allowances as provided by the amended 1939 Code was based on a broad public policy—'the desirability of maintaining the present high level of public health and morale', and that the courts and the Commissioner gave vitality to the public policy. (R. 21-22).

* * * the 'medical expense' provisions of the 1954 Code evidence a broad public policy to maintain 'the present high level of public health and morale' and the statute is clearly remedial in nature. Such a statute, effecting 'liberalizations of the law in the taxpayer's favor ***begotten from motives of public policy***' is not only 'not to be narrowly construed' but is to be broadly construed in the taxpayer's favor." (R. 27-28).

It is significant, also, that the Undersecretary of the Treasury (Marion B. Folsom), when he appeared before the Senate Committee on Finance at a hearing to consider the 1954 Code "medical expense" provisions, submitted a document in which he called attention to the changes above mentioned and stated as to them as follows:

> "Overall effect of proposed changes is to *liberalize and extend relief in real hardship situations due to heavy medical expense but curb deductions* of ordinary or luxury living expenses *in guise of medical costs.*" (emphasis supplied). 1 Senate Hearings on the Internal Revenue Code of 1954, 83d Cong., 2d Sess: p. 103.

As Judge Frank pointed out in the dissent which he filed in *Ochs* v. *Commissioner*, 195 F. 2d 692, 695 (2d Cir. 1952):

> "Humane considerations in revenue laws are undeniably exceptional. But there is no good reason why, when, for once, Congress, although seeking revenue, shows it has a heart, the courts should try to make it beat feebly. Here is a man earning between $5,000 and $6,000 a year. His wife was operated on for cancer three years earlier and has still not regained the use of her voice. The doctor says that she will not get any better—may indeed have a recurrence of the cancer, this time surely fatal—unless she is separated from her two children, aged six and four. The children are young, healthy, active and irrepressible; their mother cannot speak above a whisper without pain. She becomes ever more nervous and irritable when they are around; her voice does not improve when it should. The father (instead of sending her to a sanitarium) sends the children away to school and seeks to deduct the cost therefor as a 'medical expense.'
>
> The Commissioner, the Tax Court, and now my colleagues, are certain Congress did not intend relief for a man in this grave plight. The truth is, of course, no one knows what Congress would have said if it had been faced with these facts.

* * *

> The Commissioner seemingly admits that the deduction might be a medical expense if the wife were sent away from her children to a sanitarium for rest and quiet, but asserts that it never can be if, for the very same purpose, the children are sent away from the mother—even if a boarding-school for the children is cheaper than a sanitarium for the wife. I cannot believe that Congress intended such a meaningless distinction, that it meant to rule out all kinds of therapeutic treatment applied indirectly rather than directly —even though the indirect treatment be 'primarily for the * * * alleviation of a physical or mental defect or illness.' The cure ought to be the doctor's business, not the Commissioner's.
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> * * *
>
> The only sensible criterion of a 'medical expense'—and I think this criterion satisfies Congressional caution without destroying what little humanity remains in the Internal Revenue Code—should be that the taxpayer, in incurring the expense, was guided by a physician's bona fide advice that such treatment was necessary to the patient's recovery from, or prevention of, a specific ailment." Id. at 696.

There is much authority of a high order to support Judge Frank's view. Thus in *Helvering* v. *Bliss*, 293 U.S. 144 (1934), this Court, being confronted with an analogous problem, viz., the deduction for charitable contributions, observed in the final paragraph of its opinion:

> "The exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed."

In like vein, it was said in *Hollander* v. *United States*, 248 F. 2d 247 (2d Cir. 1957), that

> "The statute may be characterized as a remedial one intended for the relief of certain classes of taxpayers. It is axiomatic that such a statute should be construed in favor of those intended to be benefited."

We respectfully submit that the deduction for medical expenses, first enacted as Section 127, Revenue Act of 1942, was a relief measure having its origin in a strong and clear public policy. This being the true nature of the deduction, the statute must be interpreted with sufficient liberality so as to allow as medical deductions, at the very least, those expenses which clearly never would have been incurred but for the existence of an illness or physical condition and obedience to a physician's advice with respect thereto.

POINT IV

The definition of "medical care", as developed under the Internal Revenue Code of 1939, has not been changed so as to exclude from such definition extraordinary expenses incurred in connection with medically necessitated travel.

The Commissioner, in stating that "prior to the adoption of the 1954 Code, * * * Section 23(x) allowed the deduction as a medical expense of the costs of transportation, lodging, and meals on trips taken for medical purposes" (Br. 12, top), omits a very important qualification. He fails to mention the fact stressed under Points I and II, *supra*, i.e., that, in practice, such allowances were rarely made, and, then, only in those cases which involved "such extraordinariness of fact and circumstances as would lift

these costs from the status of living expenses to medical care." With this in mind, we meet squarely the Commissioner's contention that in the 1954 Code 'Congress excluded by intentional omission any deduction for food and lodging." (Br. 16).

There can be no more appropriate starting point than an examination of the pertinent provisions of 1939 Code Section 23(x) and 1954 Code Section 213, respectively, which to afford a ready comparison are set forth in adjacent columns as follows:

1939 CODE	1954 CODE
SEC. 23. DEDUCTIONS FROM GROSS INCOME.	SEC. 213. MEDICAL, DENTAL, ETC., EXPENSES.
In computing net income there shall be allowed as deductions:	(a) ALLOWANCE OF DEDUCTION.—There shall be allowed as a deduction
(x) MEDICAL, DENTAL, ETC., EXPENSE.—Expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer * * *.	The expenses paid during the taxable year, not compensated for by insurance, or otherwise, for medical care of the taxpayer * * *.
The term "medical care", as used in this subsection, shall include amounts paid	(e) DEFINITIONS.—For purposes of this section— (1) The term "medical care" means amounts paid—
for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body * * *.	(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body * * *, or
	(B) for transportation primarily for and essential to medical care referred to in subparagraph (A).

As noted by the Court below, "the provisions of Section 23(x) of the 1939 and Section 213 of the 1954 Code, other than with the respect to the deductibility of transportation expenses, are identical." (R. 14).

Having reenacted the 1939 Code definition of "medical care" in the form of subparagraph (A) of 1954 Code Section 213 (e)(1), Congress added, in the disjunctive, sub-

paragraph (B). Plainly, all which subparagraph (B) purports to do is to allow, as medical expense, amounts paid "for transportation primarily for and essential to medical care referred to in subparagraph (A)." Neither the Commissioner's claim to the contrary nor his reasons in support thereof will bear analysis.

At the outset, we are impelled to challenge (and correct) the following erroneous and unfounded assertions contained in the Commissioner's brief:

(a) "Clearly, the cost of the lodging for the taxpayer and his family in Florida was a 'personal, living, or family' expense. Indeed, unlike transportation, the costs of lodging are the kind of personal expenses which all taxpayers, sick or well, have to incur." (Br. 9).

We submit that a "well" taxpayer who owns and resides in a home in New Jersey, does not have to incur, as did this taxpayer, the additional expense of lodging in Florida in order to avert a fifth and possibly fatal heart attack during the winter months.

(b) "* * * Section 213(e) expressly allows the deduction of amounts spent for * * * hospitalization * * *." (Br. 9).

Section 213(e) *does not expressly* allow (or even mention) a deduction for hospitalization (i.e., room and board at a hospital). Such allowance arises from the Commissioner's interpretation of Section 213, thus giving rise to an indefensible inconsistency to which we shall advert presently.

The crux of the Commissioner's argument is that no deduction for food and lodging can be allowed for any purpose under the 1954 Code unless an express statutory

provision can be cited for the allowance thereof. For this proposition, the Commissioner relies on Section 262 which provides that "[e]xcept as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." (Br. 9). This, argues the Commissioner, is a significant departure from 1939 Code Section 24(a)(1) which, as shown under Point III, had contained a specific exception in the case of extraordinary medical expenses deductible under Section 23(x). (Br. 14).

However, if one resorts to legislative history, as the Commissioner urges be done here, it will be noted that the reports of both the House Ways and Means Committee and Senate Finance Committee expressly state that "[t]his section [262] corresponds to Section 24(a)(1) of the 1939 Code. *No substantive change is made.*" H. Rept. No. 1337, 83 Cong. 2d Sess., p. A65; S. Rept. No. 1622, 83 Cong. 2d Sess., p. 225. (Emphasis supplied.)

Accordingly, if the result for which the Commissioner contends herein is made dependent upon what the Committee reports say Congress intended, the most that can be said respecting the interplay between Sections 213 and 262 is that Section 262 was not intended to effect any substantive change, the Commissioner's belief to the contrary notwithstanding. However, that may be, there are more fundamental defects, (or, more accurately, inconsistencies) in the Commissioner's contention that expenses for food and lodging under no circumstances can be deductible in the absence of express statutory authority therefor. We refer in particular to the numerous regulations and rulings issued by the Commissioner under the 1954 Code describing circumstances under which he *will* allow deductions for food and lodging despite the absence of any express statutory authority. Two examples suffice:

1. Treasury Regulations 1.213-1(e)(1)(v) provide:

> "The cost of in-patient hospital care (including the cost of meals and lodging therein) is an expenditure for medical care. The extent to which expenses for care in an institution other than a hospital shall constitute medical care is primarily a question of fact which depends upon the condition of the individual and the nature of the services he receives (rather than the nature of the institution). * * * While ordinary education is not medical care, the cost of medical care includes the cost of attending a special school for a mentally or physically handicapped individual, if his condition is such that the resources of the institution for alleviating such mental or physical handicap are a principal reason for his presence there. In such a case, the cost of attending such a special school *will include the cost of meals and lodging,* if supplied, and the cost of ordinary education furnished which is incidental to the special services furnished by the school." (Italics supplied).

Thus, by a progression of steps within the same regulation[5], the Commissioner had abandoned irrevocably his original thesis that Section 262 prohibits deduction of any living expenses not *expressly* authorized by statute. First, the Commissioner permits food and lodging expenses of hospital in-patients, based not on express *statutory* authority but on authority of the Committee reports. Next, he allows food and lodging expenses in institutions other than hospitals, but similar in purpose. Finally, in Rev.

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[5] The force of a Treasury Regulation as an aid to statutory interpretation becomes impaired by its own internal inconsistency. *U. S.* v. *Calamaro*, 354 U. S. 351, 359 (footnote 12).

Rul. 58-280, 1958-1 CUM. BULL. 157, the Commissioner goes further and holds that the total cost of *meals, lodging, and ordinary education*, furnished at a special school, public or private, to a mentally or physically handicapped individual constitutes medical care deductible under Section 213, "if his condition is such that the resources of the institution for alleviating such mental or physical handicap are a principal reason for his presence there." To like effect is Rev. Rul. 58-481, 1958-2 CUM. BULL. 107.

In each of the last two mentioned situations, the Commissioner's interpretation finds neither express statutory support nor support in the Committee reports. This is because the Commissioner himself recognizes—quite properly—that neither the language of Section 262 nor the word "hospital," as used in the Committee reports, can be applied literally, without giving rise to illogical and discriminatory results. This being so, the question is simply where to draw the line.

The Court below, adverting to the foregoing deviation by the Commissioner from his professed strict construction of the "medical care" definition, makes the following observation, the logic of which is not easily assailable:

> "The foreseeable circumstances that at a given time and a given place overcrowding in hospitals or institutions would preclude use of their facilities and necessitate non-hospital and non-institutional shelter and meals in a private home, hotel or apartment, does not seem to have been considered by the Commissioner. Nor has he given consideration to the fact, of which judicial notice may be taken, that hospital and institutional costs are so high as to be prohibitive to a large percentage of those in need of 'medical care'." (R. 25).

For a dramatic illustration of overcrowding in hospitals and the existence of waiting lists, the Court's attention

is respectfully directed to testimony to be found in 2 Senate Hearings on H.R. 8300, 83d Cong., 2d Sess., pp. 1084-1088, particularly at page 1087.

We submit that the Commissioner has effectively accepted the contentions made under Points I and II of our argument by ruling that the extent to which food and lodging are deductible is "primarily a question of fact which depends upon the condition of the individual and the nature of the services he receives (rather than the nature of the institution)." Treas. Reg. §1.213-1(e)(1)(v). Moreover, it might be illuminating if the Commissioner would advise the Court by what logic he could apply his regulation to disallow as medical expense the cost of food and lodging in either of the following cases:

Example 1: Following nine operations for cancer at a hospital near his home, Taxpayer A went to the University Hospital at Madison, Wisconsin for further surgery. There, he was operated on daily for 26 consecutive days, during which he lost nearly 40 pounds. His condition both physically and emotionally was poor. His attending physicians believed that the crowded conditions at the hospital, the hospital fare, and the hospital atmosphere were all combining to retard his recovery. Accordingly, arrangements were made to transfer Taxpayer A to a quiet room in a nearby hotel from which the hospital could be reached in five minutes time by ambulance. As a preliminary to the transfer, Taxpayer A's wife was trained by his doctors on how to take care of him and what to do in the event of an emergency. In the quieter, more pleasant (and less expensive) surroundings of the hotel, and with food of his choice delivered to his room, there was a marked improvement in Taxpayer A's condition. He remained at the hotel for an extended period during which he could not be moved farther away because of the necessity to return to the hospital each day for post-surgical treatment.

Example 2: After Taxpayer B became stricken with lung cancer, his local doctors had done an "exploratory" and determined the case to be inoperable. Taxpayer B thereupon traveled to the Cancer Research Center at Madison, Wisconsin for treatment. The attending doctors at Madison wish to admit him to the hospital, but there is no bed for him and a long waiting list of other cancer patients ahead of him. Consequently, Taxpayer B stays at a nearby hotel and travels back and forth daily by taxi for the drastic irradiation and Chemo-therapy treatments, which have met with some measure of success at Madison.

Perhaps the Commissioner's position on the cases thus posed will be stated at the oral argument. Meanwhile we pass on to another example of the Commissioner's inconsistency.

2. Section 170 of the 1954 Code, relating to charitable contributions and gifts, contains no reference whatever to a deduction for food and lodging. On the contrary, Section 170(e) which defines the "charitable contributions" which may be deducted under 170(a) refers merely to a "contribution or gift to or for the use of" a charitable donee. Notwithstanding the absence of any express provision for deduction the cost of food and lodging, and notwithstanding, further, the asserted significance of Section 262, Treas. Reg. §1.170-2(a)(2) provides in clear, unabashed, unequivocal language:

> "Reasonable expenditures for meals and lodging necessarily incurred while away from home in the course of rendering donated services also are deductible."[6]

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[6] Specific illustrations of when food and lodging expenses are deductible as charitable contributions under Section 170 have been provided by the Commissioner in Revenue Ruling 58-240, 1958-1 CUM. BULL. 141-143.

For the purpose of this section, the phrase 'while away from home' has the same meaning as that phrase is used for purposes of Section 162."

In the final analysis, as these rulings attest, a taxpayer, whether receiving medical care on the one hand, or performing voluntary services for a charitable organization on the other hand, may, notwithstanding the absence of an express statutory provision, deduct otherwise personal expenses as costs of food and lodging so long as he can show that such expenses would not have been incurred but for the medical necessity to travel or be located away from home in the one case, or the necessity to be away from home in the performance of his voluntary charitable services in the other case. This, we submit, is the standard which has been applied in every medical deduction case to come before the courts, and as the sole test applicable, was correctly applied by the Courts below.

We feel that Congress did not intend to draw an arbitrary line between hotels and other buildings. The mere fact that Congress put its restrictive language in the Committee Reports rather than in the statute suggests that this

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[7] The same inconsistency which permeates the argument that Section 262 prohibits all personal expenses not otherwise *expressly* allowed in the Code, is likewise present in the Commissioner's interpretation of Section 263. The latter section expressly disallows any deduction for capital improvements which increase the value of property with four expressly listed exceptions. Notwithstanding the fact that capital expenditures incurred for medical reasons are not among the exceptions listed in Section 263, the Commissioner has announced that he will follow *Berry* v. *Wiseman* 174 F. Supp. 748 (D.C. Okla. 1958), where the cost of an elevator installed on medical advice was allowed as a medical deduction. Rev. Rul. 59-411, 1959-2 CUM. BULL. 100; *Raymon Gerard* 37 T.C. No. 81 (1962).

is the case. Had Congress been willing to adopt a harsh and arbitrary distinction this could quite easily have been done by statutory language. But it did not. It must therefore have intended the Commissioner and the Courts to apply a rule of reason and treat each case on its merits.

Perhaps the most startling of the anomalies inherent in the Commissioner's position arises from his published acquiescence, in 1960-1 CUM. BULL. 4, with respect to that portion of the Tax Court's opinion which held that the taxpayer's transportation expenses to Fort Lauderdale are deductible as "medical care" under Section 213(e)(1)(B).

Subparagraph (B), it will be remembered, adds to the category of deductible medical expenses, amounts paid "for transportation primarily for and essential to medical care referred to in subparagraph (A)." Clearly, therefore, the allowance of a deduction for transportation under subparagraph (B) is dependent upon the existence of "medical care" within the meaning of subparagraph (A). Otherwise stated, the statute expressly requires that a taxpayer have received "medical care" under subparagraph (A) before he can have any basis for claiming a deduction for transportation expenses under subparagraph (B). It is, therefore, illogical and inconsistent to acknowledge that the taxpayer's transportation to Fort Lauderdale was "primarily for and essential to medical care referred to subparagraph (A)", without also conceding that such medical care (that is, under subparagraph (A)) was received by the taxpayer in Fort Lauderdale. But, *what medical care?*

Anticoagulent therapy and presence in Florida during the winter constituted the taxpayer's twin medical link to survival. (R. 4-5).

Now, to which of these two concurrent phases of this taxpayer's "medical care" within the intendment of subparagraph (A) did the Commissioner inevitably refer when he acquiesced in allowing a deduction for transportation expenses (subparagraph (B)) to the taxpayer? Was it the anticoagulant therapy taken by the taxpayer while in Fort Lauderdale including the periodic testing? The taxpayer did not have to go to Florida for this type of treatment. He could have received that at home from the doctor whom the Tax Court found and the Commissioner concedes to be one of the foremost cardiologists in the world. No, the medical care which the taxpayer received in Florida was *being there*. Specifically the medical care received by the taxpayer in Florida was that described in detail in the findings of fact made by the Tax Court. (R. 4-5).

The Court of Appeals summarized the inconsistency of the government's position in these words (R. 32):

> "In connection with the foregoing it must also be said that at the trial in the Tax Court, the Commissioner's theory of his case was that taxpayer's travels to Florida and his stays there were not 'for the treatment, prevention, alleviation or cure of any disease' and accordingly did not constitute 'medical care'. It may also be pointed out, in view of the Commissioner's position here (1) in not challenging the Tax Court's finding that taxpayer's travels to Florida were necessary as 'medical care'; (2) in acquiescing in the allowance of taxpayer's transportation expenses to Florida as 'medical care'; and (3) in confining his contention here to the non-allowability of rental deductions under the 1954 Code, the Commissioner, nevertheless in the Tax Court, via his counsel, stated that '* * * *it would be inconsistent* to allow him the transportation to Florida and not to allow him the rent, our position

being that these trips to Florida were not necessary at all.'" (Emphasis added.)

In *Commissioner* v. *Lester*, 366 U. S. 299 [6 L. ed. 2d 306, 310], Mr. Justice Clark enunciated the rule which should be applied here, when he said:

"And as we have frequently stated, the Code must be given 'as great an internal symmetry and consistency as its words permit.'" [Citing *U.S.* v. *Olympic Radio & Television*, 349 U.S. 232, 236.]

Under the weight of the multiple inconsistencies with which it is burdened, the Commissioner's theory for excluding lodging costs as medical expense collapses.

POINT V

Statements found in Committee reports (but *not* in the statute to which they relate) should not be given the force and effect of law, particularly where such reports contain ambiguities, reflect internal inconsistency, give rise to confusion and inequity, and are patently at variance with the spirit and overall intent of the statute.

We have already shown that the Commissioner himself does not truly regard the interplay between Sections 262 and 213 as requiring the strict interpretation of "medical care" for which he contends here. Likewise, we have provided, cogent reasons why the Commissioner's attempted limitation on the scope of "medical care" is at once unreasonable and out of harmony with the overall legislative scheme.

We now turn to the language in the Committee reports associated with Section 213. "Finally, and most conclu-

sively," claims the Commissioner in his brief, "the Committee reports explicitly state the intent of Congress." (Br. 17). Moreover, argues the Commissioner, "To disregard the Committee reports in this case would, we submit, not only reopen the specific issue of the extent of the medical deduction with reference to food, lodging, and transportation, which was settled by the 1954 Code, but also invite unnecessary litigation with respect to many other provisions of the revenue laws, the terms of which are often clarified and explained by reference to the careful statements of the drafting and reporting committees." (Br. 19-20).

The Court of Appeals, in referring to these self-same Committee reports reached the following conclusion:

> "In our view the most that can be said of the legislative history here is that it creates an ambiguity with respect to the statutory provisions and that being so it cannot be availed of under the teaching that the use of legislative history is to 'solve, but not to create any ambiguity.' [fol. 31] The least that can be said of the legislative history is that if it has the impact on Section 213 urged by the Commissioner it would effect a construction of the statute that 'would produce incongruous results' and that, we have been told, is to be avoided." (R. 28).

We now shall seek to confirm the validity of the foregoing observation. In setting forth below the relevant excerpts of the Committee reports upon which the Commissioner relies, we have italicised those words and phrases which as we are about to demonstrate, are so ambiguous and self-contradictory as to vitiate their usefulness as an aid to statutory construction:

"Subsection (e) defines medical care to mean amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of diseases or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance), or for transportation primarily for and essential to medical care. The deduction permitted for 'transportation primarily for and essential to medical care' *clarifies existing law* in that *it specifically excludes* deduction of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a patient must go to Florida in order to *alleviate specific chronic ailments* and to escape unfavorable climatic conditions which have proven injurious to the health of the taxpayer, and the travel is prescribed for reasons other than the general improvement of a patient's health, the cost of the patient's transportation to Florida would be deductible but not his living expenses while there. However, if a doctor prescribed an appendectomy and the taxpayer chose to go to Florida for the operation not even his transportation costs would be deductible. *The subsection is not intended otherwise to change the existing definitions of medical care,* to deny the cost of ordinary ambulance transportation *nor to deny the cost of food or lodging provided as part of a hospital bill.**** H. Rep. No. 1337, 83d Cong., 2d Sess., p. A60 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4197); S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 219-220 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4856)."

"A new definition of 'medical expenses' is provided which allows the deduction of only transportation expenses for travel prescribed for health, and not the *ordinary* living expenses incurred during such a trip.*** (S. Rep. No. 1622, p. 35 (3 U.S.C. Cong. & Adm. News,

supra, p. 4666))." H. Rep. No. 1337, p. 30 (3 U.S.C. Cong. & Adm. News, *supra*, p. 4055)."

Our consideration of the above quoted legislative materials would not be complete without reference to an additional document upon which the Commissioner places reliance. We refer to the summary of the principal provisions of the House Bill, presented at the Senate hearings on the Internal Revenue Code of 1954 by Marion B. Folsom. This document is referred to in a footnote [5] on pages 12 and 13 of the Commissioner's brief. The relevant excerpts from Mr. Folsom's explanatory document are as follows:

"Item 9 in this memorandum explained the changes made in the House bill from the old law with respect to the medical expense deduction: (p. 103)

9. MEDICAL EXPENSE DEDUCTION

Present	*Proposed*
• • •	• • •
(c) Fairly broad definition of medical expenses.	(c) Tighten definition to exclude ordinary household supplies. Permit deduction of cost of transportation necessary for health but not *ordinary* living expenses incurred during trip.
	Overall effect of proposed changes is to *liberalize* and *extend relief in real hardship situations due to heavy medical expense*

Present	*Proposed*
	but *curb* deduction of *ordinary or luxury* living expenses *in guise of medical* costs. *** 1 Senate Hearings on the Internal Revenue Code of 1954, 83d Cong., 2d Sess."

The first difficulty created by the Committee reports is the statement that "the deduction permitted for 'transportation' [subparagraph (B)] *clarifies existing law.*" As we already know, existing law permitted a deduction for food and lodging under extraordinary circumstances when incurred primarily for medical reasons.

Extensive research and resort to dictionaries, lexicons, and thesauri fails to disclose even the remotest suggestion that "clarify" is synonymous with, or usable in the same sense as, such words as: "change", "alter", "modify", "narrow", or "amend." "Clarify" implies rather the act of clearing up existing doubt in the minds of those who do not understand or who believe incorrectly. If, therefore, Congress intended the complete elimination of extraordinary medical expenses for such previously deductible items as food and lodging, it is simply incomprehensible that Congress should refer to such an obvious and drastic change as one which "clarifies existing law."

The next defect in the Committee reports is the statement that subparagraph (B) "specifically excludes deduction of any meals and lodging while away from home receiving medical treatment." Examination of subparagraph (B) reveals, however, that "deduction of any meals and lodging, etc." is not specifically excluded. In fact, Section 213

makes no mention whatsoever of meals and lodging. Thus, even if it were the intent of Congress to change rather than clarify the definition of medical care by the specific exclusion of any deduction for meals and lodging, Congress simply failed to carry out any such intention or to write into the statute any such specific exclusion.

We next come to the example given in the reports of the patient who "must go to Florida in order to alleviate a specific chronic ailment" and whose expenses in doing so become non-deductible. It may well be that the Committees had in mind annual trips for health of a chronic but not critical nature such as those whose costs were disallowed in *Samuel Dobkin*, 15 T.C. 886 (1950); *Edward A. Havey*, 12 T.C. 409 (1949); *Frances Hoffman* 17 T.C. 1380 (1952); *Martin W. Keller*, 18 P-H Tax Ct. Mem. ¶49,185 (1949); and *Rodgers* v. *Commissioner, supra;* Cf. also *Gunnar E. Brickson*, 23 P-H Tax Ct. Mem. ¶54,303 (1954), *Austin T. Flett*, T.C. Memo 1960-157, and *Arthur D. Foyer*, T.C. Memo 1960-244. However, the travel undertaken in the case *sub judice*, as was stressed under *Point I, supra*, was not merely to alleviate a chronic ailment. It was to enable the taxpayer to regain heart function to an extent sufficient for survival and to prevent the likelihood of a fifth and fatal heart attack. We stress here the further statement in the Committee report that "subsection [B] is not intended otherwise to change the existing definitions of medical care."

As further buttressing our belief that the addition of subparagraph (B) was not intended to alter the well established scope of medical care" as defined in subparagraph (A), the Committee reports state that the type of expenses which are made nondeductible by the addition of subparagraph (B) are the "*ordinary* living expenses incurred during such a trip." The clear-cut and well established dis-

tinction between ordinary and extraordinary living expenses was fully treated under *Point II, supra.* Finally, we come to the document which Mr. Folsom presented at the Senate Hearings wherein it is pointed out that *"ordinary"* living expenses during a health trip were to be nondeductible; and further, (and most significantly, we contend) that *"overall effect* of proposed changes is to *liberalize* and *extend relief in real hardship situations due to heavy medical expense* but *curb* deduction of *ordinary or luxury* living expenses *in guise of medical* costs. * * * 1. Senate Hearings on the Internal Revenue Code of 1954, 83d Cong., 2d Sess."

Having in mind the Congressional intent expressed in the above quoted document, we submit it to be inconceivable in this case for the taxpayer's lodging expense which is in issue here be regarded as "ordinary or luxury living expenses in the guise of medical costs." Much more accurately could the taxpayer's situation be described as one of "hardship * * * due to heavy medical expense", for the relief of which Section 213 was intended to, and should apply.

The Committee reports upon which the Commissioner relies so heavily are thus both contradictory and ambiguous. That such materials once analyzed are of little value in the interpretation of statutes, was expressly recognized in *United States* v. *Dickerson,* 310 U. S. 554, 561-562 (1940), a case cited by the Commissioner (Br. 19) in support of his thesis that there is no rule of law forbidding resort to explanatory legislative history. In the words of Mr. Justice Murphy:

> "Legislative materials may be without probative value, or *contradictory,* or *ambiguous,* it is true, and in such cases *will not be permitted to control* the customary meaning of words or overcome rules of syntax or con-

struction found by experience to be workable." Id. at 562. (Emphasis added).

An explanatory tale should not wag a statutory dog. *A. P. Green Export Co.* v. *United States*, 284 F. 2d 383 (Ct. Cl. 1960).

A limitation cannot be written into a revenue provision merely because a Committee report suggests such action. *Commissioner* v. *Cannon Valley Milling Co.*, 129 F. 2d 642 (8th Cir. 1942).

On pages 18 and 19 of his brief, the Commissioner cites a wealth of authority in support of his argument that the example given in the Committee reports furnishes the "clincher" in this case. We cannot agree. A study of the cases cited by the Commissioner shows why not.

Boston Sand and Gravel Co. v. *United States*, 278 U. S. 41 (1928), was an admiralty case involving a claim for interest on damages against the United States. The language of the "special" act involved being neither clear nor specific, legislative history was indeed resorted to. However, reliance was placed on a persistent congressional attitude extending over many years, not on the language of a single Committee report. From its broad spectrum study, the Court concluded, that when Congress has wished to allow interest against the United States, it "has spoken with careful precision."

It is true that in *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, Committee reports were availed of for the guidance of the Court. It is likewise true that those reports were found to be logical, plausible, and internally consistent; and that they gave rise neither to confusion nor inequitable consequences.

The Commissioner's brief quotation (Br. 19) from *United States* v. *American Trucking Assns.*, 310 U. S. 534,

scarcely reveals the great wisdom to be found in the majority opinion of Mr. Justice Reed, whose brilliant review of the ground rules for determining congressional intent begins with a caveat worthy of remembrance:

> "There is no invariable rule for the discovery of that [congressional] intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning certainly would not contribute greatly to the discovery of the purpose of the draftsmen * * *" Id. at 542.

As a further caution against accepting words of seemingly plain meaning, Mr. Justice Reed adds:

> "When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one, '*plainly at variance* with the policy of the legislation as a whole' [citing *Ozan a* v. *United States*, 260 U. S. 178, 194], this Court followed that purpose rather than the literal words." Id. at 543.

And again at page 544:

> "Emphasis should be laid, too, upon the *necessity for appraisal of the purposes as a whole* of Congress in analyzing the meaning of clauses or sections of general acts." (Emphasis supplied.)

The resort to legislative history in *Bulova Watch Co., Inc.* v. *United States*, 365 U.S. 753, was not to aid the Court in determining what a section of the Code meant, but rather which of two separate sections purporting to govern the running of interest was intended by Congress to be ap-

plicable to a refund based on an unused excess profits credit carry back.

Commissioner v. *Lester*, 366 U.S. 299, was a case in many respects paralleling this. It involved Section 23(o) of the 1939 Code which permits a deduction for alimony and which, like Section 23(x) had been added to the Code in 1942 as a relief measure for the benefit of taxpayers burdened simultaneously with high taxes and alimony. In *Lester* the resort to legislative history was not for the purpose of reading language into the statute so as to fill a legislative void but to confirm that the word "fix" had been used in Section 23(o) as a streamlined synonym for the phrase "specifically designate." Far from supporting the Government's theory here, *Lester* holds that the Commissioner is bound by the language of the statute and may not add to or change it by administrative fiat or by appeal to the courts. As Mr. Justice Douglas observed in his concurring opinion:

> "The revenue laws have become so complicated that I think the Government in moving against the citizen should also turn square corners.
>
> • • •
>
> Resort to litigation rather than to Congress, for a change in the law is too often the temptation of government which has a longer purse and more endurance than any taxpayer."

Association of Westinghouse Salaried Employees v. *Westinghouse Electric Corp.*, 348 U.S. 437, dealt with the question of whether Section 301 of the Labor Management Relations Act of 1947 was procedural or jurisdictional. The Court consulted legislative history in great detail. At the same time, Mr. Justice Frankfurter, speaking for the majority, asks rhetorically, "how far are courts to go in re-

shaping or transforming the obvious design of Congress in order to achieve validity for something Congress has not fashioned?" Id. at 454. However, since the legislative history, "in its relevant aspects" confirmed the court's conclusion, Justice Frankfurter answered his own question with this quotation of Mr. Justice Cardozo:

> "We think the light is so strong as to flood whatever places in the statute might otherwise be dark." [*Hopkins Federal S & L Assoc.*, 296 U.S. 315, 334-335]. Id. at 454.

In *United States* v. *Rosenblum Truck Lines*, 315 U.S. 50, the Court was asked to determine the scope of the "grandfather clause"[5] of the Motor Carrier Act of 1935 and specifically held that Congress had not intended that the broad rights of a common carrier be bestowed on one who as of the critical date conducted only a single transportation service. Otherwise such a wholesale distribution of permits would result as to defeat the very purpose of Federal regulation. Citing *United States* v. *American Trucking Assoc.*, *supra*, Mr. Justice Murphy, speaking for the Court, said:

> "Where the plain meaning of words used in a statute produces an unreasonable result, 'plainly at variance with the policy of the legislation as a whole,' we may follow the purpose of the statute rather than the literal words." Id. at 55.

That being true in cases where words used in a *statute* produce unreasonable results, how much more needful it is to reject an example found in a *Committee report* which is obviously out of harmony with the underlying spirit and background of the statute and which if literally applied causes gross discrimination between taxpayers.

Before attributing to Congress the intent to write into law everything stated in the Committee reports which accompanied the Internal Revenue Code of 1954, it is well to remember that the Code consists of several thousand varied provisions and that the associated Committee reports, themselves, fill a volume of respectable size. In this context, the observation of a learned scholar and eminent Solicitor General, is at once apt and cogent:

> "It would seem, however, that there are limits to the extent to which Members of Congress may be said to acquiesce in the work of their committees. Occasionally reports are prepared in executive departments in such a way as to lay the foundation for a judicial interpretation which could not be written into the bill in unambiguous language without the risk of losing votes essential to its passage. Moreover, overemphasis on legislative guides may lead to a distorted view of the statutory purpose no less than literalism, for much less thought is spent on the future implications of committee reports and explanations on the floor than in choosing the words of a statute; and not even votes in the Senate or House on amendments can be assumed to imply every inference which may logically be deduced from them." Cox, *Hand and the Interpretation of Statutes.* 60 HARV. L. REV. 370, 381.

We may assume the possibility that the foregoing was written in a somewhat more objective frame of reference than was the brief (of the government herein) on which author's name occupies a prominent place. However that may be, the views expressed in 60 HARV. L. REV., *supra*, were more recently echoed in *Acker* v. *Commissioner* 258 F. 2d 568 (6th Cir. 1958) aff'd 361 U.S. 87 (1959), where the Court of Appeals stated:

> "It seems to us a policy of first order that taxpayers under this 'government of laws and not of men' be entitled to expect that whenever the Congress intends to exact a penalty for a particular omission, this will be done by unequivocal language embodied in a statute regularly enacted conformably to the Constitution, and not by a committee report that is neither voted on by the members of both Houses nor submitted to the President for his approval."

As the Court below noted, "we are here dealing with a remedial statute which under the applicable rule is to be construed in favor of the taxpayer, so that what was said in *Acker* is pertinent here." (R. 30).

Schwegmann Brothers v. *Calvert Distillers Corp.*, 341 U.S. 384, was a case where language in Committee reports was so out of harmony with the intent of the Miller-Tydings Act of 1937 (under which the case arose), as revealed by other sources of legislative history that such reports were rejected as not being a helpful guide. Mr. Justice Douglas aptly observed that if the draftsman of the bill sought the result expressed in the Committee reports, "it was strange indeed that he omitted [from the statute] the one clear provision that would have accomplished that result." Id. at 391-392.

Colony, Inc. v. *Commissioner*, 357 U.S. 28 arose under Section 275* of the 1939 Code. The taxpayer had understated his gross income by overstating the basis of some property he had sold. The question to be resolved was whether or not such understatement constituted an "omis-

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* Section 275 enlarged the normal three year period of limitations to five years "[i]f the taxpayer *omits* from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return***."

sion" under Section 275. In support of his contention that "omit" and "understate" are synonyms, the Commissioner cited the repeated use of the word "understatement" in the Committee reports. The Commissioner's contention was rejected, Committee reports notwithstanding, in view of a contrary overall intent revealed by legislative history and also in order not "to create a patent incongruity in the tax law." Id. 36-37.

The Committee reports associated with 1954 Code Section 213 fall far short of establishing a clear, consistent or unambiguous legislative intent to deny a medical deduction for food and lodging expenses. Certainly not in cases such as this, *Carasso* v. *Commissioner, supra,* the two hypothetical examples described on pages 25 and 26, *supra,* or any other case where such expenses have been *incurred for no purpose other than proven medical necessities.*

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.[8]

Respectfully submitted,

MARTIN D. COHEN,
Attorney for Respondent.

LOUIS J. COHEN,
LAURENCE N. ROSENBAUM,
MEYER H. SCHER,
of Counsel.

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[8] The Commissioner has consented to the affirmance of the judgment below if the question of deductibility *vel non* of lodging expense is resolved against the government. (Br. 20-21, f.n. 6).

APPENDIX

Table 1

Food, lodging, etc. disallowed (in full) as medical expense

1. *Herman A. Brody*, 18 P-H Tax Ct. Mem. ¶ 49,071 (1949). (rent and maid's wages)
2. *Samuel Dobkin*, 15 T.C. 886 (1950) (food, hotel and travel expense)
3. *Gunnar E. Erickson*, 23 P-H Tax Ct. Mem. ¶ 54,303 (1954). (travel and lodging)
4. *Austin T. Fleet*, T.C. Memo 1960-157 (rent and living expenses)
5. *Arthur D. Foyer*, T.C. Memo 1960-244 (hotel, travel and meals)
6. *Everett F. Glaze*, T.C. Memo 1961-244 (school tuition)
7. *Est. of Samuel Grobart*, T.C. Memo 1961-128 (children's nursemaid)
8. *Edward Hauser*, 18 P-H Tax Ct. Mem. ¶ 49,095 (1949) (day care of child)
9. *Edward A. Havey*, 12 T.C. 409 (1949) (transportation, room, board and incidentals)
10. *Frances Hoffman*, 17 T.C. 1380 (1952) (son's food and lodging in equable clime)
11. *H. B. House*, T.C. Memo 1959-47 (candy, magazines, clothes and incidentals for patient in mental institution)

Table 1

12. *Martin W. Keller,* 18 P-H Tax Ct. Mem. ¶ 49,185 (1949) (railroad fare and rental)

13. *Estate of Carolyn E. Libby,* T.C. Memo 1955-180 (gravestone)

14. *Benjamin P. Martin,* T.C. Memo 1960-140 (payments to babysitters to enable mother to receive treatment)

15. *McVicker* v. *United States,* (D.C. Cal. 1961) 8 AFTR, 2d 5020 (payments to servant for housework and baby care to permit housewife to enjoy quiet convalescence)

16. *Namrow* v. *Commissioner,* 288 F. 2d 648 (4th Cir. 1961) (cost of psychoanalysis for psychiatrist in training)

17. *Ochs.* vs. *Commissioner,* 195 F 2d 692 (2d Cir. 1952) cert. denied, 344 U.S. 827 (child care to provide relief for ailing wife)

18. *Gordon Pascal,* T.C. Memo 1956-83 (tuition at school for child with mild psychological problem)

19. *Vincent P. Ring,* 23 T.C. 950 (1955) (trip to shrine at Lourdes for *spiritual* aid to alleviate physical defect)

20. *Rodgers* v. *Commissioner,* 241 F 2d 552 (8th Cir. 1957) (trips to more salubrious climate did not involve "such extraordinariness of fact***as could lift these costs from the status of living expenses to medical care. . . . . .")

Table 2

21. *Gilbert Hume Rowe*, T.C. Memo 1959-100
(room, tuition, board, books and personal needs of former psychiatric patient enrolled at University)

22. *O. G. Russell*, 22 P-H Tax Ct. Mem.
¶ 53,356 (1953) (toothpaste, toothbrushes and toilet articles)

23. *Joseph Scura*, T.C. Memo 1958-161
(expenses for month and a half at resort for recuperation of unproven authenticity)

24. *John J. Thoene*, 33 T.C. 62 (1959)
(dancing lessons as psychiatric therapy)

25. *Estate of Eugene Merrick Webb*, 30 T.C. 1202 (1958)
(special diet)

26. *George B. Wendell*, 12 T.C. 161 (1949)
(practical nurses for normal infant whose mother died in childbirth)

Table 2

Food, lodging, etc. allowed (in part) as medical expense

1. *Carasso* v. *Commissioner*, 292 F 2d 367 (2d Cir. 1961)
(travel expense allowed; food and lodging disallowed)

2. *Doris V. Clark*, 29 T.C. 196 (1957), acq., 1958-2 (Cum. Bull. 4
(doctors, drugs, medicines, hospitalization and medical insurance premiums and transportation to doctors allowed; special dietary foods disallowed)

Table 2

3. *Estate of Myrtle P. Dodge,* T.C. Memo 1961-346
   (50% of wages, food and board of non-nurse helper allowed)

4. *Embry's Estate* v. *Gray,* 143 F Supp. 603 (D.C. Ky., 1956)
   ($750 out of $1,481.34 spent for lodging, meals, transportation and incidentals allowed)

5. *Hobart J. Hendrick,* 35 T.C. No. 128 (1961)
   ($3,000 out of $6,270 paid to school held to be deductible as payment for psychiatric services)

6. *Estate of Jacob Hentz,* 22 P-H Tax Ct. Mem. ¶ 53,110 (1953) ($1,535 of $2,340 paid as wages to convalescent's attendant)

7. *Martin J. Lichterman,* 37 T.C. No. 60 (1961)
   (All but $350 out of $2,509.59 paid to school in Arizona disallowed as not being primarily for medical care)

8. *Estate of Benjamin F. Pepper,* T.C. Memo 1956-167
   (expense of therapeutic travel allowed psychiatric patient but not expenses of friend who visited her)

9. *L. Keever Stringham,* 12 T.C. 580 (1944) acq. 1950-2 Cum. Bull. 4; aff'd per curiam 183 F 2d 579 (6th Cir. 1950)
   (transportation of asthmatic child to Arizona school, and food and lodging there allowed; tuition disallowed)

Table 3

Food, lodging, etc. allowed (in full) as medical expense

1. *Commissioner* v. *Bilder*, 289 F 2d 291 (3d Cir. 1961)
   (rent and travel expense)
2. *Donovan* v. *Campbell*, 7 AFTR 2d 1236 (D.C. Tex., 1961)
   (deaf child's tuition at special school)
3. *William H. Duff II*, 22 P-H Tax Ct. Mem. ¶ 53,362 (1953)
   (lodging and travel)
4. *Misfeldt* v. *Kelm*, 44 AFTR 1033 (D.C. Minn., 1952)
   (taxis to employment for occupational therapy on doctor's advice)
5. *William B. Watkins*, 23 P-H Tax Ct. Mem. ¶ 54,102 (1954)
   (Florida lodging in wintertime for an elderly couple actively suffering from multiple afflictions)